SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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October Term 1967
No. 254

BERNARD KAPLAN; ALBERTO BERUMEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

A Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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A Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners Bernard Kaplan and Alberto Berumen pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 1, 1967.

OPINIONS BELOW.

The District Court for the Central District of California rendered no written opinion in this matter. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pages 6-16, is as yet unreported.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1967. An Order denying a Petition for Rehearing, which was filed within the prescribed time allowed therefore, was denied

by the Court of Appeals on April 18, 1967. (A copy of the Order denying the Petition for Rehearing is printed in Appendix B hereto, *infra*, page 6.) An Order extending time to file Petition for Writ of Certiorari was subsequently granted by this Court, extending such time to and including June 17, 1967. The jurisdiction of this Court is involked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED.*

1. Whether Petitioners were deprived of "assistance of counsel" within the meaning of the Sixth Amendment to the Constitution of the United States by being forced to trial using the same attorney, despite an actual conflict in their respective interests which was or should have been known to the court.

2. Whether Petitioners were denied Due Process of Law by virtue of the prejudice suffered by them resulting from the illegal and improper examination by the court, without Petitioners' consent or request, of certain reports compiled by government agents pertaining to the instant prosecution.

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*Other questions which will be raised should certiorari be granted:

1. Whether Petitioner Kaplan was denied Due Process of Law by virtue of being improperly advised of his constitutional rights before he allegedly made certain prejudicial admissions which were used as a basis for his conviction on Counts three and five of the indictment herein.

2. Whether Petitioner Kaplan, as a matter of law, could be found guilty of aiding and abetting as charged in Count three of the indictment, when he was not charged as a principal in said count, and when the only party therein charged as a principal was acquitted.

3. Whether the Trial Court improperly denied Petitioner Kaplan's Motion to Supress six $100.00 counterfeit Federal Reserve Notes which were admitted into evidence, despite the fact that they were obtained as a result of an illegal search and seizure, and which evidentiary items served as a basis for said Petitioner's conviction under Count five of the indictment herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

STATEMENT.

The constitutional and statutory provisions involved in the instant Petition are set forth in Appendix A, *infra*, pages 1-5.

On January 13, 1965, a five-count indictment was returned by the Grand Jury and was filed against Petitioners and one Ronald N. Reinhardtsen in the United States District Court of the Southern District of California, Central Division. Count One of the indictment charged Petitioners Bernard Kaplan and Alberto Berumen, together with Ronald N. Reinhardtsen, of conspiring together "to pass, utter, publish and attempt to pass, utter and falsely make, forged, and counterfeited obligations of the United States" in violation of Title 18, United States Code, Section 371. All of said parties were subsequently acquitted on this count. [R. 372.] Counts 2 and 4 of the indictment charged Petitioner Berumen with unlawfully passing a counterfeit Federal Reserve Note in violation of Title 18, United States Code, Section 472; while Count Three made the same charge against Defendant Reinhardtsen and additionally charged Petitioner Kaplan with aiding, abetting, counseling, inducing and procuring the commission of Defendant Reinhardtsen's alleged offense in violation Title 18, United States Code, Sections 2 and 472. Count Five of the indictment charged Petitioner Kaplan and Defendant Reinhardtsen with a further violation of Title 18, United States Code, Section 472—*i.e.*, possessing and concealing with intent to defraud six Federal Reserve Notes, all of which were counterfeit.

A. Pretrial Proceedings.

Petitioners were arraigned on January 25, 1965, before the Honorable Charles H. Carr, District Judge. At the time of arraignment both Petitioners were represented by Attorney Howard E. Beckler. Petitioners' respective pleas, however, were continued until February 8, 1965, at which time Petitioners pled not guilty to the respective counts of the indictment. The matter was set for trial. On March 4, 1965, a Motion to Suppress evidence was filed on behalf of Defendant Reinhardtsen, which motion was subsequently joined in on behalf of Defendant Kaplan. [R. 15.] This Motion to Suppress was opposed by the government, and continued for hearing until the time of trial.

On the date originally set for trial, Monday, March 29, 1965, Attorney Beckler made a Motion on behalf of Petitioners—specifically Petitioner Kaplan—for a continuance predicated upon the grounds that on the prior Saturday at a final interview with both Petitioners, he was provided with certain information not previously given to him by Mr. Kaplan, which established a definite conflict of interest between the Petitioners, both of whom he was then representing. Attorney Beckler further informed the Court that he made his motion as an officer of the Court; that "there is a definite conflict of interest between the two Defendants Berumen and Kaplan;" that the motion was not a "dilatory tactic" on his part; that the information was not something he could have previously ascertained; that he was sure that such information would "inhibit" Petitioners' testimony; and that he felt he could no longer properly represent both Petitioners and had advised Petitioner Kaplan that he would continue to represent only Petitioner Berumen. [R. viii-x.]

On examination by the court Mr. Beckler declared that he had learned from Mr. Kaplan that facts underlying certain statements said Petitioner had previously made were "extremely essential to the defense of Mr. Berumen." [R. xii.]

The Court proceeded to inquire whether a continuance until Thursday would aid in permitting Mr. Kaplan to obtain new counsel. Both Messrs. Beckler and Kaplan, however, questioned whether it would be possible to obtain and prepare new counsel by said date. [R. x.] When counsel for the Government opposed a continuance because it would inconvenience some of its witnesses, the Court then set the trial for Thursday, April 1, 1965. Mr. Beckler, however, after first stating that he had other matters at that time and was otherwise engaged up to April 19, 1965 [see R. xiii, xiv], further stated that if the matter could not be continued until April 19, he would arrange for petitioner Kaplan to have "competent prepared counsel" who would answer ready "today". [March 29, 1965.] [R. xiv.] Thereupon the Court set the matter for trial on the following morning, March 30, 1965.

B. Evidence and Testimony at Trial.

1. Conflict Discussion.

At the outset of the trial Petitioners and Defendant Reinhardtsen orally and in writing advised the Court that they desired to proceed to trial without a jury. Both Petitioners Kaplan and Berumen stated that they had given the matter full consideration before making such waivers. All the attorneys also consented to the waivers. [R. 1-9.] Attorney Beckler then notified the Court that he believed the conflict problem which he

had earlier raised was resolved because there was no longer a "contingency of a jury trial." Petitioners also stated that they had discussed the matter with Beckler and had been advised by him that there was no further conflict because of the jury waiver. [R. 12-14.]

2. Consideration of Non-Evidentiary Government Reports.

During the course of the trial and shortly after Treasury Department Agent Tomsic, chief Prosecution witness, took the stand, Petitioners' attorney became aware that the Government attorney had given the court certain reports and correspondence. These were carefully read and examined by the judge. [These reports are a part of the record herein and are designated as United States Treasury Secret Service Treasury Department Report Form No. 1588, File No. J-4-3-CO-2344-11, dated February 2, 1965, and letter from Treasury Department to Manuel L. Real, dated January 5, 1965, bearing File No. J-4-3-CO-2344-11.] [R. 159.] Counsel for Petitioner's denied the right of the judge to examine and consider such documents because there had been no motion by any of the defendants to require the production of such documents under Title 18, United States Code, Section 3500, *et seq.*, because said counsel were unaware of the judge's examination until such time that the documents had already been read; and because the documents in question contained substantial hearsay and other prejudicial matter. The trial judge, however, concluded that his examination was proper. [R. 159-162.]

3. Evidence Offered at Trial on Substantive Issues.

There was evidence offered at trial to the effect that on two separate occasions,—*i.e.*, on December 6th and 19th of 1964,—Petitioner Berumen had allegedly passed a counterfeit $100.00 Federal Reserve Note.

Other evidence offered at trial tended to show that on December 17, 1964, defendant Reinhardtsen had passed a counterfeit $100 Federal Reserve Note to an employee of the G. R. Kirk Company, that defendant Reinhardtsen was arrested by Agent Tomsic on December 19, 1964, at the Kirk Company lot; that the automobile defendant Reinhardtsen had in his possession at the time of arrest was sometime thereafter removed to the federal garage; that said automobile was allegedly seized for carrying couterfeit money; and that on December 20, 1964, Agent Tomsic discovered six counterfeit $100 Federal Reserve Notes located in an envelope in the truck of the automobile. The notes and envelope in question were admitted into evidence following denial of Petitioners Motion to Suppress and over their objections to the introduction of said evidence. [R. 318-319.]

Other evidence offered was that Petitioner Kaplan was apparently with defendant Reinhardtsen at the Kirk Company lot on December 17; that the automobile carrying the six counterfeit notes and envelope was in the general possession of Petitioner Kaplan; that on December 19, Petitioner Kaplan was questioned by Agent Tomsic, was advised that any statement he made could be used against him (but not that he had the right to remain silent) [R. 248], but was not taken into custody. Other evidence was offered to show that on December 20 and subsequent to the search of the automobile, Mr. Kaplan acted suspicious while removing certain property from the automobile. Petitioner Kaplan was not advised of his constitutional rights on the 20th prior to the time he allegedly made these suspicious movements. [R. 251-253.]

C. Decision of the Courts Below.

Following denial of the Motion to Suppress Evidence and conclusion of the remainder of the trial, the trial judge found that none of the defendants were guilty as to Count One of the indictment (*i.e.*, there was no conspiracy); that defendant Reinhardtsen was not guilty as to Counts Three and Five of the indictment; but that Petitioner Berumen was guilty as to Counts Two and Four of said indictment, while Petitioner Kaplan was guilty as charged in Counts Three and Five thereof.

Thereafter Petitioner Kaplan was sentenced concurrent terms of three (3) years each on Counts Three and Five of the indictment. Petitioner Berumen was also sentenced to three (3) years each on Counts Two and Four of the indictment to run concurrently. Petitioners Berumen and Kaplan filed Notices of Appeal and applications for bail pending appeal, which applications were granted. Petitioner Berumen's Notice of Appeal was filed *in propria persona*. Present counsel were thereafter substituted as attorneys of record.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment.

REASONS FOR GRANTING THE WRIT.

I. The decision of the Court of Appeals gives a scope and application of the law dealing with "effective assistance of counsel" so narrow and restrictive in interpretation that it erodes the constitutional guarantees provided by the Sixth Amendment to the United States Constitution as enumerated by this Court in *Glasser v. United States*, 315 U.S. 60 (1942). The basic issue involved here is the duty of a trial judge to insure that a trial is conducted with full consideration for the rights

of the accused. The court must protect and see that an accused is afforded effective assistance of counsel. (See *Glasser v. U.S., supra,* 315 U.S. 60, 71.) This is not a mere formality. All persons must have effective counsel if our system is to survive.

Although in *Glasser* this Honorable Court concluded that "[t]he right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . ." (315 U.S. 60, 76), the Court did not specifically enumerate the actions which would be required of a trial judge to determine whether an accused was furnished *effective* assistance of counsel. It is submitted that the criteria which must be followed by the trial judge was wrongly determined by the Court of Appeals. Such issues are momentous and call urgently for the consideration and determination of this Court.

It will be recalled that originally Beckler, appearing for both Petitioners, moved for a continuance to permit Petitioner Kaplan adequate time to obtain new counsel due to an inherent and definite conflict of interest between Petitioners Kaplan and Berumen.

Mr. Beckler's statements established that there was a definite conflict of interest. Accordingly if Attorney Beckler had at this stage continued to represent Petitioners the record would clearly show that Petitioners were denied "the assistance of counsel" guaranteed by the Sixth Amendment. (*Glasser v. United States, supra,* 315 U.S. 60, 76.)

On March 30, 1965, court was convened without new counsel being present and/or substituted for either of Petitioners in place of Mr. Beckler. Thereafter, peti-

tioners both orally and in writing advised the trial judge that they desired to proceed to trial without a jury. After counsel also consented to such waivers, the court permitted them. It was then that Attorney Beckler notified the court that he believed that the conflict problem which he had earlier raised had been resolved because there was no longer a "contingency of a jury trial." *Petitioners also advised the court that they felt the conflict was resolved because their attorney so advised them.*

Summarizing the trial testimony regarding the instant issue, it is clear that Attorney Beckler had knowledge of an actual conflict in interest, and volunteered to procure new counsel for one of the Petitioners because of it. Attorney Beckler did not, however, procure such counsel, but instead told the court that the conflict had apparently been resolved because of the waiver of a jury trial. Petitioners, relying on Attorney Beckler's advice, agreed to continue with him as their counsel. Under such circumstances the qestion before this Court is two-fold—*i.e.,* namely (1) what duty was owed by the trial judge to inquire as to the nature of the conflict existing between Petitioners in order to ascertain whether they were being furnished effective assistance of counsel; and (2) whether Petitioners waived their right to question the same by statements they made based on their counsel's conclusion that the actual conflict in question had been resolved.

The Court of Appeals concluded that there could be no question of Petitioners being denied effective assistance of counsel because the trial judge had no obligation to inquire further once counsel for Petitioners advised him that the conflict in interest between Peti-

tioners had been resolved. The Court of Appeals concedes, however, that the trial court might inquire further, but that such inquiry is and is not a constitutional right. Such holding is in direct conflict with the rationale of *Glasser v. United States, supra,* 315 U.S. 60, and with the holding in *Campbell v. United States,* 352 F.2d 359 (D.C. Cir. 1965). In *Campbell* the District Court reversed the conviction of one of the defendants because his defense was substantially prejudiced by sharing counsel with his co-defendant. The record in the case was silent as to whether the defendants were sufficiently aware of the importance of having separate counsel. The court concluded:

> "When two or more defendants are represented by a single counsel, the District Court has the duty to ascertain whether each defendant has an awareness of the potential risk of that course and nevertheless has knowingly chosen it.
>
> ". . . In our opinion we have suggested that co-defendants are 'entitled to be represented by seperate counsel . . . [if] there was some inconsistency in joint representations.' (citation). We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest (citation). . . . The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has

advised his clients of the risks. Consideration of effective judicial administration as well as the important rights of defendants are served when the trial court makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney. . . . We must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel. (citation.)" (at pp. 360-361.)

Petitioners submit that under the *Glasser* and *Campbell* cases, *supra*, once a trial court is made aware of the fact that a definite or even potential conflict in interest exists between two or more accused criminals represented by the same attorney, the Court must inquire as to the nature of the conflict, even if counsel thereafter suggests that such conflict has been resolved. The individual defendant is not capable of knowing what legal problems a potential conflict might create. He must and should be able to rely on both his attorney and on the Court for help. This Court cannot prevent a rule requiring sole reliance upon the attorney.

For example, in the instant case the conduct of Mr. Beckler alone required further action by the trial court in order to protect Petitioners' rights as soon as Mr. Beckler became aware of the potential conflict he notified the court and requested a continuance to permit Mr. Kaplan to obtain new counsel. When, however, the court agreed to continue the matter for only two days, Mr. Beckler stated that he was busy then, and was similarly occupied for the balance of the month. He said *he* preferred to go to trial on the date originally set *which was the very same day he was making his Motion for a Continuance* (and provided to obtain and

adequately prepare other counsel by that afternoon). Attorney Beckler made such statements after first recognizing that it might not be possible for Petitioner Kaplan to obtain and have other counsel prepared even by Thursday of the week in question. [See R. 10.] It is obvious now and must have been clear to the trial court that Attorney Beckler's sudden change of mind concerning his clients conflicting interests was influenced far more by his reluctance, to go to trial and the alternative dates mentioned than by a sound judgment. The needs of petitioners Beckler is not the guardian of Petitioners' constitutional rights—but this Court is. They must be protected.

The demands of the Fifth and Sixth Amendments cannot be met if the trial judge is not required to ascertain for himself whether a known or potential conflict exists.

Under these circumstances the judge has several alternatives. He could refuse the waiver of a jury and inquire further into the potential conflict. He could remand the matter to the assigning trial court for further inquiry by that court or some other judge as to the nature of the conflict. He could request further information on the conflict himself, and thereafter, if satisfied that such a conflict did in fact exist and that the disclosure thereof to him might be prejudicial in his mind to the conduct of a fair trial, then disqualify himself. In the instant case no further inquiry was made and this, it is submitted, constitutes reversible error.

Turning to the question of Petitioners' alleged waiver of their right to assert that they received ineffective assistance of counsel, it is clear that no such waiver was made. The ultimate issue as to whether a defend-

ant competently waives his right to counsel is whether he knowingly and intelligently chooses to do so. (See *United States v. Smith*, 337 F.2d 49 (4th Cir. 1964).)

A brief perusal of Petitioners' applications for setting of bail pending appeal shows that neither Petitioner has any legal training nor is capable of making legal decisions without the advice of counsel. Unquestionably, they relied solely upon Attorney Beckler's advice. Under these circumstances there was certainly not an "intelligent, confident waiver" within the meaining of the *Glasser*, case, *supra*, 315 U.S. 60.

Insofar as Petitioners permitting Mr. Beckler to continue to represent both of them at trial, it is totally inconceivable that they could intelligently make such a decision without advice of other counsel or of the court in lieu of Mr. Beckler's representations that there would be no conflict if he continued to represent them. It must be remembered in this regard that this is not an action wherein two or more parties represented by the same counsel are continually aware of the conflict, but decide to continue with the same counsel despite the conflict. Petitioners herein relied upon Mr. Beckler's statements to them that the conflict had been resolved by virtue of the trial by court.

II. In holding that the trial judge had the absolute right to examine certain highly prejudicial reports and statements of government witnesses (commonly known as "Jencks Act" statements under Title 18, United States Code, §3500 (Appendix A, *infra*, pp. 3-5)), even though Petitioners did not consent or request such examination, the court below has decided a Federal question of substance which has not but should be settled by this Court.

Clearly, a fundamental concept of "due process of law" is that parties to controversies are entitled to have them determined by an impartial tribunal which is free from bias and prejudice. (*Lee v. Fleming,* 158 F. 2d 984, *cert. den.* 331 U.S. 805; *Baker v. Simmons Company,* 342 F. 2d 991 (1st Cir. 1965).)

In the instant case both the United States Treasury Secret Service Department report dated February 2, 1966 and the letter from the Treasury Department to Manuel L. Real, dated January 5, 1966 (both of which documents bear File No. J-4-3-CO-2344-11 and which are part of the record herein), contain numerous inadmissible hearsay and other objectionable matter, including information as to the prior criminal records and felony convictions of Petitioners. This information would otherwise never have come before the trial judge. (See *Enriquez v. United States,* 188 F. 2d 313 (9th Cir. 1951).) Petitioners submit that such examination was improper for any purpose under the facts of the case.

What factually transpired in the trial which brought to light this apparent error was that shortly after Agent Tomsic, Chief Prosecution Agent, took the stand on direct examination to present testimony in opposition to appellants' Motion to Suppress, and before testifying on direct examination on the substantive issues involved, counsel for all parties and the trial judge entered into the following discussion:

"Mr. Inman: May I inquire as to a separate matter of the court? Did Mr. Balaban present to the court a copy of Agent Tomsic's report?

"The Court: Let's see. There are three different documents here. One is a copy, I take it, of a

letter addressed on the letterhead of the Treasury Department to Manual Real with a second sheet headed 'Details of Offense.'

"Now, that is one, and then there are three pages, and on the fourth page is a list of exhibits A, B, and C.

"Then there is another document which apparently is on a form and it is a report made by Robert Tomsic, and that is the Form 1588 of the United States Secret Service, Treasury Department.

"Mr. Inman: I am somewhat uninitiated in the handling of reports of this nature. Off the top of my head, your Honor, I would not think that it was proper. I would not think it proper for Mr. Balaban to have presented to the trier of fact in this particular action a copy of the Agent's report, which I have read and which contains a substantial amount of hearsay and things of this nature. Now, I really don't know what the proper procedure or practice is.

"The Court: Ordinarily, if it weren't for the Jencks Act, I wouldn't give any of it to you; but, anything that pertains to the Jencks Act goes to the court.

"Mr. Inman: That is the only point I have inquired about.

"The Court: You see, oftentimes the court has to rule on these matters as to whether or not they have been given to counsel.

"Mr. Inman: I knew that Mr. Balaban's voluntary delivery of the statements to us, which we appreciate, of course, under Jencks, is proper. I

do not know whether under Jencks it was proper to give such reports to the trier of fact, your Honor.

"The Court: It usually goes to the trier of facts first; but, of course, the court is a trier without a jury. It doesn't change.

"Mr. Beckler: Can I address the court just in that regard, too? The only problem that is bothering me, your Honor, is that we didn't make a Jencks motion and therefore the court had no reason to rule on the admissibility of a witness' statement by virtue of 3500 US.

"The Court: These are merely statements for counsel to use in cross examination.

"Mr. Beckler: I understand that, your Honor, but I am wondering. When a Jencks problem arises, the court in camera usually reviews that to see which part the defense counsel will get. How about the academic problem where the question never arises? Does the court then have the rightful authority to read these statements? I am wondering.

"Mr. Balaban: Your Honor, if I may interject one thing: Not only are the documents handed to the court for the purposes of seeing whether they should be turned over to defense counsel, but they also have to be previewed by the court in order to find out which witness the document is a statement about. In other words, the Jencks Act doesn't cover all things said about all people. At the same time I handed both defense counsel a copy, at the request of the court I handed the court a copy of the documents.

"Mr. Beckler: That is true when the Jencks problem arises, but it hasn't arisen yet and I am wondering if the court in reading these is somewhat premature. I have no motion even. I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down." [R. 159-162.]

The statements involved were presented by the United States Attorney to counsel for Petitioners and their co-defendant at trial *at the time Agent Tomsic was called to the stand.* [See R. 154-155.] Counsel for Petitioners strongly questioned the right of the Trier of Fact to examine such documents without there being a Motion made under Title 18, United States Code, §3500 *et seq.* Such statements were never offered into evidence either for substantive purpose or in connection with the Motion to Suppress.

The Court of Appeals did not queston the fact that the statements in issue were highly prejudicial. Instead, said Court concluded that the reading of such documents was "necessary and proper . . . in view of the pending Motion [to Suppress]." Such conclusion is clearly in conflict with the provisions of the Jencks Act and appropriate case law.

Under Title 18, United States Code, §3500, the defense has the right to make the demand for and receive the production of certain statements and reports of government witnesses. Subsection (a) thereof provides that no such inspection or discovery is proper until such time as the government's witness testifies on direct exam-

ination in the trial of the case. Sub-section (b) provides:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on *motion of defendant,* order the United States to produce any statement . . . of the witness in possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it delivered directly to the defendant for his examination and use." (18 U.S.C. §3500 (b).) (Emphasis added.)

Subsection (c) of §3500 states in part that if the United States makes a claim that any of the statements ordered to be produced under §3500 deal with matters not related to the subject matter of the testimony of the witness, then the court is directed to inspect the statements and delete the objectionable portions.

Case law dealing with these so-called "Jencks Act" statements makes it clear that these statements are not to be procured until and unless counsel for defendant requests same. (See *United States v. Tellier,* 255 F. 2d 441 (2nd Cir., 1958), cert. den. 358 U.S. 821, 79 S. Ct. 33, 3 L. Ed. 2d 62 (1958).)

As was stated in *Mims v. United States,* 332 F. 2d 944 (10th Cir., 1964), at page 948.

> ". . . the Jencks Act provides that after a witness called by the government has testified on direct examination, the court shall, on motion of defendant, require the government to provide any statement of the witness in possession of the government which relates to the subject matter of his testimony. (citation)."

The court in *Mims, supra,* further held that the trial judge was under no duty, absent some form of request, to have the government present such statements to the court and that the court was not a cross-examiner and strategist for the defense; the rationale of the court being that counsel for the defense might be content to rest with whatever psychological advantage cross-examination without the use of such statements might bring forth.

The fact that the statements herein were considered at the time a Motion to Suppress was before the trial court does not in any way conflict with the above rationale. Not is it reasonable to interpret from the facts any waiver by Petitioners of their objection to such examination. It is submitted that it was grossly inequitable and highly prejudicial to permit the trier of fact to examine the aforesaid statements without Petitioners requesting or agreeing to such examination.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Attorneys for Petitioners.

APPENDIX A.

Statutes and Constitutional Provisions.

1. United States Constitution. Amendment Fifth and Sixth.

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment V. Grand Jury Indictment For Capital Crimes

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Statutes.

Title 18, United States Code, §2.
Title 18, United States Code, §371.
Title 18, United States Code, §472.
Title 18, United States Code, §3500.
Title 18, United States Code, §4208 (a)(2).

§ 2. Principals

Whoever, with intent to defraud, passes, utters, pub-States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the

punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 705.

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States. any statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of court under paragraph (b) or (e) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

§ 4208. Fixing eligibility for parole at time of sentencing.

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than and shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Bernard Kaplan and Alberto Berumen, *Appellants, vs.* United States of America, *Appellee.* No 20,728.

[March 1, 1967]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Jones, Judge, U. S. Court of Claims, and Barnes and Jertberg, Circuit Judges.

Barnes, Circuit Judge:

This is an appeal from convictions after a court trial of a five count indictment charging appellants and one other codefendant in Count I with conspiracy to pass counterfeit money (18 U.S.C. §§ 371, 472); Berumen in Counts II and IV with passing counterfeit money (18 U.S.C. § 472); Kaplan with aiding and abetting the passing of counterfeit money by the codefendant in Count III; and Kaplan and the codefendant with possession and concealment of counterfeit money in Count V.

All defendants were acquitted on Count I, Berumen convicted on Counts II and IV, and Kaplan convicted on Counts III and V and the codefendant Reinhardtsen acquitted on both substantive counts.

Jursdiction below rested on 18 U.S.C. § 3231. It exists here pursuant to 28 U.S.C. § 1291.

Counsel representing the successful defendant below now represents both appellants. He urges six grounds for reversals, with heavy emphasis on the first two.

They are:

1. Appellants were denied effective assistance of counsel due to an inherent conflict of interest;

2. The trial court erroneously examined certain reports of government agents;

3. The denial of the defendant Kaplan's motion to suppress six $100 counterfeit bills invalidated his conviction under Count V;

4. Kaplan could not be guilty of aiding and abetting under Count III as a matter of law;

5. The denial of inspection of defendants' statements "in hands of the government" was error; and

6. Appellant Kaplan was denied due process of law.

We consider each alleged error in turn.

I.

Appellants are entitled to meaningful representation by counsel, without any possibility of conflict of interest present between any two of two or more defendants. *Glasser v. United States,* 315 U.S. 60 (1942), *Lugo v. United States,* 350 F.2d 858, 859 (9th Cir. 1965). In determining this question, the trial court must be able, and be freely permitted, to rely upon counsel's representations that the possibility of such a conflict does or does not exist. The necessary adequate representation by an attorney which the law requires implies that the court may rely on the solemn representation of a fact made by such attorney as an officer of the court. The court may go further into the factual situation if he desires, but is under no original or continuing obligation to do so. Having determined the facts, he must then rule on the legal issues.

On March 29, 1965, Mr. Beckler, counsel in the court below representing Mr. Berumen and Mr. Kaplan, represented to the trial judge there was a recently discovered possible conflict of interest in his joint representation.[1] He failed to disclose what it was. (Supp. Tr. VIII and IX.)[2]

On March 29, 1965, a three day continuance to April 1st, 1965, was ordered (Supp. Tr. XIII) and a requested three weeks continuance denied. When counsel for appellants, once a longer continuance was denied, agreed he could be ready "today," a continuance of one day was ordered by the court.[3]

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[1]The indictment was filed January 13, 1965. A cash bond for $500 had been filed for defendant Kaplan before the United States Commissioner on December 21, 1964, and a surety bond for defendant Berumen filed the same day. On January 25, 1965, counsel Beckler filed appearances to represent the two appellants, when they were arraigned. Not guilty pleas were entered February 8, 1965, and trial set for March 29, 1965.

On March 9, 1965, attorney Beckler had filed a motion for discovery and inspection. (We note, parenthetically, that this motion sought to inspect "any and all statements made by defendants at any time or place, to officers of the United States with respect to the subject matter of the instant case, whether or not reduced to writing and/or signed by said defendants, as to which some form of recordation, note or memorandum exists, incorporating, embodying or reproducing the substance and content of such statement.") See alleged error VI, *supra*. The motion was set for hearing on March 29, 1965, prior to the actual trial.

Thus, counsel for appellant in the district court had represented each of them, certainly for sixty days, and possibly for ninety days, prior to his "discovery" of any conflict of interest.

[2]In the week preceding Monday, March 29th, 1965, Kaplan had indicated he would move for a continuance based on illness. (Supp. Tr. XII, ll. 13-20.)

[3]Supp. Tr. p. XIV, l. 16 to p. XV, l. 5 (March 29, 1965).

"The Court: Are you ready to go to trial then tomorrow morning?

"Mr. Beckler: Ready right now. Well, ready tomorrow morning. I'll call someone today and we will go over it tomorrow.

"The Court: Very well . . . ." (Supp. Tr. XV, ll. 6-11.)

When the case was called for trial on March 30, 1965, Mr. Beckler announced for his clients: "The defendant Kaplan and defendant Berumen are ready to proceed." (Tr. p. 4.)

After careful separate waivers of a jury trial (Tr. pp. 4-10), counsel for the government raised the problem whether there then existed any conflict or apparent conflict of interest. Mr. Beckler stated the conflict had been "limited to the possibility and contingency of a jury trial. Now that that matter has been disposed of, the conflict of interests—that is my representation of Mr. Berumen and Mr. Kaplan—is now satisfied. In short, there is no conflict." (Tr. pp. 12, 13.)

The trial court then satisfied himself of two things: (a) that the question of whether or not a jury trial should be had was the sole issue or conflict between the defendants, and (b) that it had been settled, not only to the satisfaction of the defendants' counsel, but to the complete satisfaction of each defendant. (Tr. p. 13, l. 1 to p. 14, l. 5.)[4]

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[4]"Now that that matter has been disposed of, the conflict of interests—that is my representation of Mr. Berumen and Mr. Kaplan—is now satisfied. In short, there is no conflict. I feel I can adequately represent both of them and intend to, and I believe it is Mr. Kaplan's desire that I proceed and go ahead with his representation during this matter.

"The Court: Very well. I will inquire of Mr. Kaplan, are you aware of that position?

"Mr. Kaplan: Yes, your Honor.

"The Court: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

"Mr. Kaplan: Yes, we have resolved anything that might have come up.

"The Court: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

"Mr. Kaplan: Yes, I sure have.

(This footnote is continued on the next page)

Unlike *Glasser v. United States, supra,* and other law cited by appellants, the record clearly and convincingly proves there was an intentional and intelligent waiver by each defendant of separate counsel. The trial judge here did precisely what *Glasser* requires—made a "clear record" of a "proper waiver," *i.e.,* a waiver "knowingly and intentionally made."

Just as we cannot speculate as to whether a conflict of interest, once it exists, would affect a trial (we can assume arguendo that it would), neither can we speculate that a right, once intelligently and knowingly waived, should not have been waived; or speculate whether or not there could have existed some other possible conflict of interest not factually disclosed, or even suggested, by a careful reading of he record even suggested, by a careful reading of the record before us. Appellants' concession is of importance.[5]

We find no merit in appellants' position on alleged Error I.

"The Court: Mr. Berumen, I would like to ask the same thing of you. You understood this?
"Mr. Berumen: Yes, we talked it out and it is all straightened out.
"The Court: You think now that without a jury trial there would be no occasion for any conflict or any conflict of any moment?
"Mr. Berumen: That is right.
"The Court: And you are quite willing at this time to proceed in trial, represented by Mr. Beckler, having in mind that he also represents Mr. Kaplan?
"Mr. Berumen: Yes, sir."

[5]Appellants' counsel concedes in their Opening Brief:

> "While appellants admit that the record has not, and necessarily cannot, reflect what the actual conflict in interest was . . ." (O.B., p. 24.)

II. *Court's Examination of Statements*

When Agent Tomsic was called to the stand, counsel for the government presented certain documents to counsel for defendants. Codefendant's counsel requested a ten minute recess to read the statements. These documents were referred to and described as follows:

> "Mr. Balaban: At the request of Mr. Inman, I, in advance of trial, presented him with certain documents which were the Jencks Act statements of the witnesses who had previously testified. Despite the fact that we are not required to turn over the statements until the witness has testified, I did not believe that we would get to Mr. Tomsic by this afternoon and I planned to give Mr. Tomsic's Jencks Act statements to defense counsel this evening in anticipation of Mr. Tomsic testifying tomorrow. I have just given them to them, handed to them the statements of Agent Tomsic prior to him taking the stand.
>
> Mr. Beckler: I agree. There is no question. We appreciate this, and, of course, Mr. Balaban is correct. We are not entitled to this until the conclusion, but it is lengthy, your Honor. I think we would save time by taking them and reading them now." (R.T. p. 154, l. 17 to p. 155, l. 7.)

The court then requested to see a copy of the statement. After identifying the witness on the stand, government counsel stated: "At this time, your Honor, I would like to state this defendant (sic) is only offered on the motion itself." (Tr. p. 159, ll. 12-14.)

This reference to "a motion" was to the pending motion of defendant Reinhardtsen to suppress. (See note 1, *supra.*) On March 15, 1965, it had been continued to the date of trial. (C.T. p. 105.)

Before Tomsic testified, the question was raised whether the court, as the trier of fact, could see the Jencks Act statements, delivered to counsel for the defendants by the government prior to the time any request was made on the record by counsel for defendants for their production. This question was never resolved or ruled upon. (Tr. p. 159, l. 17 to p. 162, l. 7.)

Counsel for appellants stated:

> "[The Jencks problem] hasn't arisen yet and I am wondering if the court in reading these is somewhat premature. I have no motion even. I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down."

No counsel for any defendant made any objection, or motion of any kind. Counsel for the codefendant conceded the delivery of the statements was "proper." (R.T. 160, ll. 21-23.)

Appellants state that they "strenuously questioned the right of the trier of facts to examine such documents without there being a Jencks motion made."

We flatly disagree. It was at best a half-hearted inquiry. When no protest or objection is made, no motion to strike made, no mistrial urged, and no record of any kind laid, it is inaccurate to describe such conduct as "strenuous questioning."

Neither can we agree that the trial judge commenced reading the statements "before either counsel was aware

of the actions of the court." (Appellants' Brief, pp. 31-32.)

The unchallenged record clearly discloses Mr. Inman, counsel for the acquitted defendant, *requested* the Jencks Act statements of the government. (Tr. p. 154, l. 17 to p. 155, l. 2.) Mr. Beckler, counsel for these appellants "agreed" and "appreciated" the courtesy of government counsel, and stated: "We are not entitled to this until the conclusion [of Tomsic's testimony] but it is lengthy . . . . I think we would save time by taking them and reading them now." (Tr. p. 155, ll. 4-7.)

A recess was then called so defense counsel could read the statement, as they requested. Only then did the court look at the document.

The Tomsic statement falls within item three of the motion to suppress (C.T. p. 13), which motion the court then had under consideration (R.T. p. 158). The only purpose for Tomsic's testimony (R.T. p. 175, l. 22; 179) was to aid the court in its determination of this motion.

We conclude not only that the perusal of the statements by the court was necessary and proper in this case in view of the pending motions; but that counsel for defendants, by his silence and inaction, inferentially waived any objections to such an examination.

III.

We can deal more quickly with the other errors urged. The third had to do with the admission of the six $100 counterfeit bills.

These were found in the white Chevrolet with Ohio license plates and a "dented" front left fender. (Tr. p. 171, ll. 6-9) after its seizure.

No search was made until *after* Tomsic had verified the fact the same vehicle had been used to transport a counterfeit $100 note to the Christmas tree lot, while Kaplan was driving. (R.T. p. 172, l. 1 to p. 173, l. 19.) He then had reasonable cause to believe the vehicle could be properly seized as a vehicle used to transport contraband. 49 U.S.C. §§ 781(a) (3) and (b) (3); 782. *Burge v. United States,* 342 F.2d 408 (9th Cir. 1964). He did seize it.

We distinguish *Preston v. United States,* 376 U.S. 364 (1964) on the same grounds as did the eighth circuit in *Drummond v. United States,* 350 F.2d 983 (1965), *cert. den.* 384 U.S. 944, *Cf. Armada v. United States,* 319 F.2d 793 (5th Cir. 1963), *cert. den.* 376 U.S. 906 (1964), *United States v. One 1963 Cadillac,* 231 F.Supp. 2 7(D.C.Wis. 1964).

IV.

We need not consider appellants' point four (Kaplan's guilt on Count III—aiding and abetting the unconvicted codefendant) in view of Kaplan's conviction on Count V, with its concurrent sentence. But see: *Rooney v. United States,* 203 F. 928, 932 (9th Cir. 1913).

V.

We find no error in the denial of appellants' motion to have government summaries of defendants' statements given before trial produced for appellants' use. No such *statements* were offered in evidence against defendants, or used at the trial against them in any way. Appellants demanded in paragraph five, six and seven of their motion[6] the production of written mem-

[6]The government conceded and complied with all demands for inspection made by the appellants except those numbered 5, 6 and 7. The motion was denied as to them. (Supp. Tr. p. IV.)

oranda made by government agents of oral statements made by defendants not shown to nor signed by defendants. They were not records "belonging" to appellants. Rule 16, Fed. R. Crim. P., *United States v. Murray,* 297 F.2d 812, 819 (2d Cir. 1962); *cert. den.* 369 U.S. 828 (1962), *Scaffer v. United States,* 221 F.2d 17, 19 (5th Cir. 1955), *Shores v. United States,* 174 F.2d 838, 843-45 (8th Cir. 1949). *Cf.: Holt v. United States,* 272 F.2d 272, 277 (9th Cir. 1959).

VI.

We agree with the answer made by the government to appellants' sixth alleged error (that appellant Kaplan was denied due process of law by use of admissions made by him when first contacted and before his arrest).

Appellants concede that appellant Kaplan was properly advised of his constitutional rights before he was interviewed by Agent Tomsic on December 19, 1964 (*i.e.,* that he did not have to make any statements; that any statements he made could be used against him in court, and that he was entitled to have an attorney. (R.T. p. 239.)) Although the warning did not follow the form required by *Miranda v. Arizona,* 384 U.S. 436 (1966) (re the right to an attorney, though indigent, *Id.,* p. 471), that ruling has no application to cases tried prior to June 13, 1966. *Johnson v. New Jersey,* 384 U.S. 719 (1966).

A repetition of this warning on December 20th, 1964, was not required under either the *Miranda* decision or the ruling of *Escobedo v. Illinois,* 378 U.S. 473 (1964). As stated in *Miranda,* 384 U.S. 436, 477:

> "The principles announced today deal with the protection which must be given to the privilege

against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way."

Similarly, the *Escobedo* ruling involved a situation where:

> "The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody." *Kohatsu v. United States,* 351 F. 2d 898, 901 (9th Cir. 1965), *cert. den.* 384 U.S. 1011 (1966). *Accord: Irwin United States,* 338 F.2d 777 (9th Cir. 1964).

Appellant Kaplan was *not* in custody at the time these admissions were made; in fact, he was allowed to return home that night. (R.T. p. 253.)[7]

Finding no error in any of the points urged, we Affirm.

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[7]The government's brief continues:

"The statement of appellants that the Federal Agents 'had him come down to the federal garage purportedly to pick up certain personal property, but actually to apparently see if he would do anything about the counterfeit bills' (Opening Brief of Appellants, p. 46) is totally without support in the record. It was established through undisputed testimony that appellant Kaplan himself requested and arranged this meeting with the Federal Agents [R.T. 240-241]." (Appellee's Brief, p. 32.)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 254

BERNARD KAPLAN AND ALBERTO BERUMEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-16) is reported at 375 F. 2d 895.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1967 (R. I, 111). A petition for rehearing was denied on April 18, 1967 (R. I, 112). On May 19, 1967, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 17, 1967. The petition was

filed on June 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, each of whom retained the same attorney and specifically consented to his representation of the other, may now claim that they were denied effective assistance of counsel by reason of a conflict of interest.

2. Whether the court, in a non-jury trial, erred in examining a statement and reports of a government witness in order to determine how long a recess defense counsel would need in order to examine the documents.

STATEMENT

In a jury-waived trial in the United States District Court for the Southern District of California petitioner Berumen was found guilty of passing a counterfeit $100 bill on two separate occasions (counts 2 and 4). Petitioner Kaplan was convicted of aiding and abetting codefendant Reinhardtsen in passing a counterfeit $100 bill and of possession of six counterfeit $100 bills (counts 3 and 5) (R. I, 4-7; R. IV, 372).[1]

The sufficiency of the evidence is not challenged. On December 6 and December 19, Berumen passed $100 bills at separate food stores after making small purchases (R. III, 26-28, 34-41, 134-138, 148-153).

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[1] Codefendant Reinhardtsen was found not guilty on counts 3 and 5, and he, Kaplan and Berumen were found not guilty on count 1, a conspiracy count (R. IV, 372).

On December 17, Kaplan and Reinhardtsen used a counterfeit bill to pay for the purchase of Christmas trees (R. III, 44-46, 96-99, 126-131). The six bills charged in count 5 were found in Kaplan's automobile after it had been seized for forfeiture because of its use in the December 17 transaction (see R. III, 174-179).

ARGUMENT

1. The indictment was returned on January 13, 1965. On January 25, attorney Beckler entered his appearance as counsel for petitioners Kaplan and Berumen. Not guilty pleas were entered on February 8, and trial was set for March 29, 1965 (R. I, 104). On March 9, attorney Beckler filed, on behalf of both petitioners, a motion for discovery and inspection (R. I, 28-32).

On March 29, 1965, the date originally set for trial, Mr. Beckler requested a continuance, stating that in a final interview with his clients two days before, he had discovered a "definite conflict of interest between the two defendants" (R. II, viii-ix). He did not specify what the conflict was. Government counsel stated that there has been no indication to him until about five minutes before court started that a continuance would be sought (R. II, xi). The court observed that it had "received word in the middle of the week that Mr. Kaplan was going to make a motion for a continuance based upon illness" (R. II, xii). The court granted a continuance for three days to the following Thursday (R. II, xiii). This colloquy followed (R. II, xiv-xv):

MR. BECKLER: Your Honor, I can arrange for Mr. Kaplan to have competent prepared counsel and we can answer ready today. I will have somebody that I recommend highly to him answer ready. * * * I will have counsel here to represent Mr. Kaplan answer ready today.

THE COURT: Are you ready to go to trial then tomorrow morning?

MR. BECKLER: Ready right now. Well, ready tomorrow morning. I'll call someone today and we will go over it tomorrow.

THE COURT: Very well. The matter will be set for trial then.

On the following day, March 30, 1965, Mr. Beckler announced that the "defendant Kaplan and defendant Berumen are ready to proceed" (R. III, 4). After separate waivers of jury trial by the three defendants (R. III, 4-10), government counsel stated that he understood from Mr. Beckler that any danger of conflict of interest had been cured and that it would be a good idea to get this "on the record" (R. III, 12). This colloquy then ensued (R. III, 12-14):

MR. BECKLER: I think that is good, your Honor. I can make a statement in that regard since our discussion in chambers as to an apparent conflict that was only limited to the possibility and contingency of a jury trial. Now that that matter has been disposed of, the conflict of interests—that is my representation of Mr. Berumen and Mr. Kaplan—is now satisfied. In short, there is no conflict. I feel I can adequately represent both of them and intend to, and I believe it is Mr. Kaplan's desire that I

proceed and go ahead with his representation during this matter.

THE COURT: Very well. I will inquire of Mr. Kaplan, are you aware of that position?

MR. KAPLAN: Yes, your Honor.

THE COURT: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

MR. KAPLAN: Yes, we have resolved anything that might have come up.

THE COURT: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

MR. KAPLAN: Yes, I sure have.

THE COURT: Mr. Berumen, I would like to ask the same thing of you. You understood this?

MR. BERUMEN: Yes, we talked it out and it is all straightened out.

THE COURT: You think now that without a jury trial there would be no occasion for any conflict or any conflict of any moment?

MR. BERUMEN: That is right.

THE COURT: And you are quite willing at this time to proceed in trial, represented by Mr. Beckler, having in mind that he also represents Mr. Kaplan?

MR. BERUMEN: Yes, sir.

In view of the lack of any showing of conflict of interest and the explicit statements by petitioners and their counsel that the alleged conflict had been resolved and that both petitioners wished to be represented by the same attorney, petitioners' claim that they were denied the effective assistance of counsel is clearly without merit. No possible conflict is suggested by the facts of the case.

The instant case is clearly distinguishable from *Glasser* v. *United States*, 315 U.S. 60, relied on by petitioners. In *Glasser* the trial judge, over Glasser's objection, had assigned Glasser's retained counsel to represent a codefendant, even though the attorney pointed out to the court that there was a conflict of interest because the evidence against Glasser would consist in large part of statements made by the codefendant in Glasser's absence. Here, on the other hand, the two defendants had retained the same counsel and expressly stated that they wanted him to continue to represent them, even though they had discussed the possibility of a conflict.

2. At a hearing on the motion to suppress the evidence as to the six counterfeit bills found in the car (filed by Reinhardtsen and joined in by Kaplan), agent Tomsic was called as a government witness to testify to the circumstances surrounding the questioning of Reinhardtsen and the seizure and search of the car.[2] Reinhardtsen's counsel asked for

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[2] Tomsic testified that he received a typewritten note, dated December 18, 1964, to the effect that a counterfeit $100 bill had been passed at the Kirk Company by a Mr. Brumer who was driving a white '63 or '64 Chevrolet with Ohio license plates, left front fender wrecked (R. III, 162-163). On the following day, after meeting Berumen at the Hollywood Police Station, Tomsic took him to the Kirk Company lot (R. III, 164-165, 170). Upon arrival there, Tomsic was informed by a Kirk employee that the man who had previously passed the counterfeit $100 bill was just getting in his car to leave (R. III, 170-171). This was Reinhardtsen, who was in the front seat of a 1963 Chevrolet with a dented left fender (R. III, 171). After being advised of his rights, Reinhardtsen said that he had

a ten minute recess so that he and petitioners' counsel could look over Tomsic's reports, which government counsel had, at the request of Reinhardtsen's counsel, given to defense counsel prior to Tomsic's testimony (R. III, 154-155). The court asked to see copies in order to determine how long a recess would be necessary. It then granted a ten minute recess (R. III, 156-157). When Tomsic was recalled to the stand both defense counsel raised the question whether the court had not looked at the material prematurely since no formal demand had been made (R. III, 159-161). Petitioners' counsel made no motion for relief saying (R. III, 162):

> I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down.

Tomsic's reports were subsequently used for cross-examination by defense counsel (R. IV, 244-245, 254, 260) but were not introduced in evidence.

The claim that petitioners were prejudiced because the trial court read the reports before counsel made a formal motion under 18 U.S.C. 3500 is without merit. If 18 U.S.C. 3500(b) had been strictly followed and the defendants had made a motion to pro-

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given the $100 bill to the Kirk Company when Kaplan was with him and that the car belonged to Kaplan, who had been driving that day (R. III, 172, 173). Tomsic informed Reinhardtsen that the car would be seized since it had been used to carry a counterfeit bill (R. III, 174). On the following day (December 20) Tomsic, in a search of the car without a warrant, discovered the six counterfeit $100 bills in an envelope in the trunk (R, III, 179; R. IV, 189).

duce after conclusion of Tomsic's testimony on direct examination, it would have been proper for the court to examine the statement to determine if it was producible. To the extent that the reports contained incompetent or immaterial evidence, *e.g.*, evidence of prior convictions, the presumption is that the court disregarded such matter. *Clauson* v. *United States*, 60 F. 2d 694, 696 (C.A. 8); *United States* v. *Fairbanks*, 89 F. 2d 949, 953 (C.A. 9).[3] The case is readily distinguishable from one in which such material has come to the attention of lay jurors.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Questions which petitioners have not argued, but which they say will be raised should certiorari be granted (Pet. 2), are covered in the opinion of the court below (Pet. App. 13-16).

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